

PROGRESS REPORT

Comm 47 CODE ADVISORY COMMITTEE

DATE: Tuesday, March 9, 2004

TIME: 9:00 a.m. – 3:00 p.m.

LOCATION: Tommy G. Thompson Commerce Center, Room 3B
201 West Washington Avenue
Madison, Wisconsin

COMMITTEE MEMBER ATTENDANCE:

Dave Blatnik	Absent	Mark Maten (Steve Osesek)	P
Richard Blatter	A	Kevin Olson	P
Tim Clay	A	Robert Pearson	P
Dave Diedrich	Present	Boyd Possin	P
Scott Hafner (Troy Batzel)	P	Tom Reinsch (Don Gallo)	P
David Havick	A	Scott Wilson	P
George Marek	A	Wendell Wojner	P

GUESTS:

Kendra Bonderud – Legislative Fiscal Bureau	Gary Henningsen – Northern Environmental
Ray de Long – REI	Jerry Jones – US Bank
Mark Giesfeldt – Dept. of Natural Resources	Lee Liebenstein – Dept. of Natural Resources
Matt Hauser – Petroleum Marketers Assn. of Wis.	

DEPARTMENT OF COMMERCE STAFF:

Oscar Herrera	Berni Mattsson
Lori Huntoon	James Moser
John Kisiel	Sam Rockweiler
Dennis Legler	Eric Scott

Dennis Legler opened the meeting with a round of introductions and a review of the agenda, and the Committee accepted the previous meeting's progress report.

Updates from Commerce and the Department of Natural Resources

Oscar Herrera explained that although structural changes are desired for the PECFA program, such as possibly replacing reimbursement with direct-pay or pay-for-performance methods, numerous statutory obligations have not yet been met, and need to be met before Commerce can develop and implement structural changes.

Mark Giesfeldt reported that Commerce and the DNR are committed to working well together, have resolved several problematic issues, and are developing solutions to others. Mark noted that despite a number of difficulties, a lot of good cleanup work has occurred under the PECFA program.

Don Gallo asked whether any legislative efforts at phasing out the PECFA program are under way. Oscar responded that the two Departments had each submitted position papers in response to a legislative request in July 2003, but have not received any subsequent notice of follow-up activities.

Revisions to Comm 47 based on current statutes

Sam Rockweiler briefly introduced the documents which were mailed electronically to the Committee on March 8, and which included draft Comm 47 rule changes developed over the past year for complying with current statutory obligations. Sam noted that the documents outline the Department's overall approach to addressing the statutory obligations, and that the documents would be discussed in more detail after the Committee completes discussion of the previously distributed draft rules for (1) public bidding and (2) making Comm 47 consistent with the current text in section 101.143 of the statutes.

Draft rules for public bidding

General discussion

Boyd Possin commented that the included proposal to sunset the criteria in section Comm 47.339, for sites where total costs will be less than \$60,000, and to instead apply public bidding to those sites, would be a substantial change. In discussing whether costs currently are adequately controlled under Comm 47.339, there was general consensus that too often the answer is no. Robert Pearson noted that the Comm 47.339 process has been helpful for fast-track sites, such as those in highway and brownfields projects, and a process for expediting those sites will continue to be needed.

Don Gallo questioned whether the current public bidding process is functioning adequately, and whether the bidding process in the proposed rules is overly complex. Don and Steve Ossek

suggested developing a process that includes state-level approval of all investigation and remedial work prior to its performance, as occurs for cleanup of dry-cleaning sites.

Eric Scott responded that the current bidding process is resulting in closing a substantial number of sites. Kevin Olson commented that bidding is a form of preapproval, for the work that is addressed by a bid specification, but the process could be improved by including more opportunity for a responsible party to respond to a low bid selected by the Department. Dennis Legler noted that implementing preapproval of all work would be difficult because the DNR has oversight of all site investigation work, and staffing there has been significantly depleted in response to recent budget cuts. Lori Huntoon noted that remediation of contamination from dry-cleaning differs significantly from remediation of contamination at PECFA sites.

Dave Diedrich commented that lending institutions may not be satisfied that a low bidder will complete the associated work successfully. Dave indicated that comprehensive preapprovals could significantly reduce that uncertainty.

Don suggested extending preapprovals to cover work that currently can cost up to \$40,000, without state-level oversight, under section Comm 47.337 (2).

Boyd Possin asked what lessons have been learned from the past six years of using a public bidding process. Eric responded that bidding sites to closure did not always function well, but bidding scopes of work is quite effective.

Gary Henningsen asked how many new sites are currently entering the PECFA program, and Dennis noted the rate is about 10 to 15 sites per month.

Robert Pearson suggested Commerce could achieve preapproval of work and could directly select consultants for individual sites, by acting as an agent for an owner [under the current definition of agent in section Comm 47.015, and the corresponding criteria in Comm 47.10 (1) (b)]. Lori questioned whether use of a regional service provider, as authorized under section 101.143 (4) (ce) of the statutes, would accomplish similar purposes.

Site investigations

Boyd recommended mandating the written site-investigation contract that is referenced in proposed section Comm 47.60 (1) (a), and suggested not reimbursing the cost of any work performed outside of the contract. Kevin recommended expanding paragraph (b) to include having the Department notify the responsible party of the requirements for subsequent contracts, the corresponding penalty, and a timeframe based on the date of the notification.

Under proposed Comm 47.62, Kevin recommended coordinating annual reports during a site investigation with annual reports that are required now by DNR, so that a single report could be filed with both agencies. Lori and Lee Liebenstein agreed a single report is preferable and intended. Eric added that a single report should likewise be developed for (1) the annual

reporting that is proposed in Comm 47.70 for completing the scope of work in a bid specification, and (2) the annual reporting during remediation that is required in Comm 46. Robert Pearson recommended having the report form include a notice of whether activities at a site may have schedule conflicts with other associated projects such as highway construction.

Boyd and Steve Oseseke questioned how quickly the Department would respond to individual progress reports for site investigations, and whether costs for work performed while waiting for a response would have a risk of not being reimbursed. Eric suggested the risk could be adequately minimized by reducing the current cap in Comm 47.337 (2) for nonapproved site investigation work, from \$40,000 to \$20,00.

Steve, Boyd, and Gary suggested expanding use of preapprovals by having the progress report form include a summary of the remaining investigation work, in addition to the estimated cost for that work. Kevin noted some scopes of work may be simple enough to include in a schedule of usual and customary costs, and preapproval should be required for all others. Steve indicated that wherever the DNR requires an activity, as referenced in proposed 47.62 (3), Commerce should reimburse the cost, and Eric noted that a schedule of usual and customary costs could be applied to those required activities. Boyd recommended clarifying 47.62 (4) to convey that the consultant determines when development of the investigation data is finished.

The bidding process

There was agreement that section 47.63 (2) should be changed to not exempt the initial work for an interim action, from bidding.

There was agreement that under 47.67, the Department would need to exercise consistency in decisions about disqualifying any individuals or firms from bidding. There also was agreement the section should more clearly account for factors that are beyond the control of consultants, such as lack of financing, or subcontractors who are paid directly by a responsible party.

Boyd recommended changing the disqualification periods in 47.67 (2) from month-based terms to terms based on rounds of bidding. There was agreement that the appeal process referenced in 47.67 (5) for disqualification from bidding should be changed to be an expedited process, in order to more effectively enforce a disqualification.

In response to cited problems with copy shops not always having needed documents on a timely basis, there was agreement to maximize Web-based access to all data needed for preparing bids under 47.68, so as to minimize use of copies and corresponding costs and delays at copy shops.

Kevin recommended providing more opportunity under 47.68 for an owner to challenge the bid that is selected by the Department as the least costly qualified bid, and recommended allowing the challenge to include professional review and advice from the owner's consultant. Boyd noted that if the ineligible costs at sites where bidding has been used are not significantly lower than at sites without bidding, then more input from owners during bidding could be helpful. Dave

Diedrich indicated that having owners closely involved can be helpful, but such involvement is the exception rather than the rule.

Requiring use of the low bidder

Ray de Long asked why section 47.69 proposes to depart from the current bidding process by requiring use of the low bidder. Dennis explained a concern for owners who are unfavorably affected if a higher bidder fails to complete the work at the lower bid, and the Department then refuses to reimburse any additional cost. Boyd indicated objections would likely arise to requiring use of the low bidder if owners are then held responsible for any failures by the low bidder. Robert Pearson noted the Department of Transportation has no mechanism to contract with bidders who have not demonstrated the qualifications that are needed for being included on the DOT's preferred provider list.

Ray strongly recommended continuing with allowing owners to contract with any consultants who agree to perform the scope of work for the cost specified in the low bid; and if any consultants then fail to complete the work at that cost, the Department should rigorously disqualify them from further remediation work, rather than raise the reimbursement amount to cover additional costs. Steve added that requiring use of the low bidder on a site with several, separate scopes of work could result in an inefficiency of having several consultants involved. Ray agreed that the selection of a consultant could be limited to one of the consultants that submitted a bid for the site.

Next meetings and timeline

There was agreement to continue discussion of the draft bidding rules at the next meeting, which was tentatively scheduled for April 14, at the same location and time. Sam Rockweiler distributed a tentative timeline showing that two additional meetings after that, in May and August, along with a public hearing in June, could allow transmitting proposed rule changes to legislative review prior to the September 1 cutoff in 2004 for these transmittals.

*Submitted by Sam Rockweiler, code consultant to the Committee
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